

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's Rules)	
Regarding the Pricing of Unbundled)	WC Docket No. 03-173
Network Elements and the Resale of)	
Service by Incumbent Local Exchange)	
Carriers)	

**Reply Comments of the
Public Service Commission of Wisconsin**

Public Service Commission of Wisconsin (Wisconsin Commission) respectfully submits Reply Comments in this proceeding to address matters related to proposed modification to the Federal Communications Commission (FCC) rules related to pricing of unbundled network elements.

Introduction

On September 15, 2003, the FCC issued its Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding. The NPRM sought comment on the issues concerning whether the FCC's pricing methodology for Unbundled Network Elements (UNEs) is working as intended and, in particular, whether it is conducive to efficient facilities investment. The FCC expressed concern that to the extent that the application of its Total Element Long Run Incremental Cost (TELRIC) pricing rules distorts its intended pricing signals by understating forward-looking costs, it can thwart one of the central purposes of the Communications Act of 1934 (the Act): the promotion of facilities-based competition. (par. 3)

The FCC stated that it is particularly interested in the perspective of the state commissions on the successes and failures of the current rules, and the possible modifications that would most help states in fulfilling their important statutory role in setting UNE prices and resale discounts. (par. 9)

While the Wisconsin Commission did not submit initial comments to the NPRM, the Wisconsin Commission has reviewed the comments submitted by other state commissions and the National Association of Regulatory Utility Commissioners (NARUC) and submits these reply comments.

There should not be interference with state commission discretion

The Wisconsin Commission believes that the FCC should continue to support state commission discretion to determine "just and reasonable" rates, and that the FCC should refrain from prescribing the level of detail the NPRM proposes for TELRIC pricing. The FCC should be aware of the possible effect of requiring certain inputs, i.e., Incumbent Local Exchange Carrier (ILEC) actual fill factors in that such a change would approximately double all unbundled loop rates.

The Wisconsin Commission recommends that if the FCC develops specific requirements for certain inputs to the cost methodology that the FCC should also clearly provide the ability for state commissions to evaluate whether the inputs provide outputs that result in just and reasonable rates. The Wisconsin Commission believes that inputs should not be evaluated in isolation, but should also be evaluated based on their context in specific models.

Changes to inputs can have significant impacts on resulting rates

The Wisconsin Commission has had experience evaluating SBC Ameritech's fill factor for copper distribution plant in its UNE cost models. The Wisconsin Commission evaluated not only the fill factor input, but also the impact that input has on the resulting unbundled loop rates. The Wisconsin Commission's *Final Decision* issued March 22, 2002, in docket 6720-TI-161 discusses the Wisconsin Commission's concern about the impact of the fill factor in SBC Ameritech's model as follows: "While in day-to-day operations, greater amounts of spare [capacity] may only create marginally small increases in total costs, this factor has tremendous impacts on the costs in Ameritech's model. This factor is added as a final multiplier to costs instead of a small addition to costs." (p. 143)

The Wisconsin Commission agrees with the FCC's assessment of fill factors: "A fill factor represents the percentage of the capacity of a particular facility or piece of equipment that is used on average over its life. Increasing the fill factors has the effect of lowering costs by reducing the amount of spare capacity that must be allocated to working units." (par. 73) However, models can be built using multiple methods. The FCC further describes a method where the model computes the total amount of investment and then divides those costs over the number of working units. However, another possible modeling approach is for a model to compute a base amount of investment that includes no spare capacity and then adds additional costs to increase the amount of spare capacity. The place in which a model makes such an addition can vary. For example, if a model in adjusting for spare capacity only increases the dollar amount of investment in cable and such an addition would be reasonable and result in a small

increase in costs. However, if a model increases the dollar amount for poles, conduit and trenching costs in addition to cable and wire, it would be unreasonable and result in a very large increase in costs. Accordingly, it is not sufficient to simply evaluate the input for spare capacity, but one must also evaluate how that factor is applied in the specific model being used in order to develop just and reasonable rates.

The FCC expresses concern that state commissions' application of the (TELRIC) methodology creates "variable results [that] may not reflect genuine cost differences but instead may be the product of the complexity of the issues, the very general nature of our rules, and uncertainty about how to apply those rules. The resulting rates might not, therefore, achieve fully the Commission's goal of sending appropriate economic signals." (par. 6.) For this reason the FCC has proposed that it should provide "more specific guidance." (par. 7) In particular, the FCC inquires whether incumbent LEC's fill factors should be dispositive given its tentative conclusion to account for real-world attributes of routing and topography of an incumbent LEC's network. (par. 74)

In response to this inquiry regarding fill factors, the National Association of Regulatory Utility Commissioners (NARUC) in its resolution advises that state commissions should have flexibility to use other than the ILEC actual fill factors. The Wisconsin Commission agrees with NARUC. While the Wisconsin Commission shares the FCC concerns that differences in UNE rates from state to state should reflect genuine cost differences, it would still be best for the FCC to avoid dictating specific cost inputs be used.

There should be a clear distinction between requiring the use of specific individual factors and providing guidance on the TELRIC methodology. This is reflected in a statement of the United States Court of Appeals:

Congress provided federal judicial review of *rates* set by state commissions; it did not provide for review of individual factors that influence those rates. A lower fill factor, which elevates the rate, may be offset by other factors that depress it. As long as the final rate comports with TELRIC, why should it matter what role particular intermediate factors played? Any effort to analyze a factor in isolation poses a distinct risk of generating an advisory opinion, as well as a risk of complicating review of the rate ultimately announced. A different way to put this is that review of agency action usually is limited to the agency's final decision, and the choice of one or two legal criteria that the agency will use along the way cannot be called a 'final' decision.

AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co, 349 F.3d 402, (7th Cir., 2003).

The court stated very clearly that only rates – and not methodologies or individual factors – are reviewable. In order for judicial review to function effectively, the Wisconsin Commission recommends that the FCC should avoid requiring any specific factors to be used for any particular input to a model. The Wisconsin Commission recommends that if the FCC does develop specific requirements for certain inputs that the FCC should also clearly provide that state commissions can still evaluate whether the input also provides reasonable outputs of just and reasonable rates.

The Wisconsin Commission believes that inputs should not be evaluated in isolation, but should also be evaluated based on their context in specific models. Requiring specific factors without consideration of the application of the factor in a particular model could result in UNE rates that do not reflect forward-looking costs. Unless state commissions are able to make such a holistic evaluation, there could be

unintended consequences from revised FCC rules that could defeat instead of promote the competitive purposes of the Act.

Conclusion

The Wisconsin Commission shares the FCC concern that the application of the FCC's TELRIC pricing rules should not distort the intended pricing signals by understating forward-looking costs. Such an effect could thwart one of the central purposes of the Act: the promotion of facilities-based competition. However, the Wisconsin Commission suggests that the state commissions must be allowed to retain the ability to evaluate the impact of model inputs on actual rates, as is discussed above.

The Wisconsin Commission appreciates this opportunity to provide input based on its experience in applying the FCC's TELRIC methodology so that possible rule revisions can be most helpful to the states, including the Wisconsin Commission, in fulfilling the important statutory role in setting UNE prices.

Dated at Madison, Wisconsin, _____

By the Commission:

Lynda L. Dorr
Secretary to the Commission

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